APPENDIX A.

United States Court of Appeals
For the Eighth Circuit.

No. 18,404.

Charles Myron Moore,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[April 19, 1967.]

Before Blackmun, Mehaffy and Gibson, Circuit Judges.

Mehaffy, Circuit Judge.

Charles Myron Moore, appellant-defendant, was tried to a jury and convicted on three counts of passing counterfeit money with intent to defraud in violation of 18 U. S. C. A. § 472. We affirm.

The sole question raised by appellant's brief is the sufficiency of the evidence to sustain the convictions. Defendant at the conclusion of the Government's evidence moved for a judgment of acquittal. This motion was made orally and counsel concluded by saying "and the Defendant requests permission to submit a written motion to the same effect at the close of all of this case." The court responded as follows: "Permission is so granted to submit a written motion. Ruling will be reserved on this motion." Defendant did not press for a ruling at the time the mo-

tion was made, and from the language used, the court would have been warranted in interpreting the statement as defense counsel's intention to immediately offer evidence on defendant's behalf. This is what he did, but nevertheless on appeal he takes the position that Fed. R. Crim. P. 29 (a) is mandatory in requiring a ruling at this stage of the proceeding; and that failure to then rule forced defendant to adduce evidence which supplied additional incriminating testimony. There is respectable authority, however, holding that there is no prejudicial error in the trial court's reserving ruling on defendant's motion for judgment at the close of the Government's case where evidence at the time the motion was made suffices to present a jury question as to defendant's guilt. *United States v. Godel,* 361 F. 2d 21 (4th Cir. 1966); *Weathers v. United States,* 322 F. 2d 566 (9th Cir. 1963). Additionally, the Second Circuit has recently ruled in *United States v. Rosengarten,* 357 F. 2d 263, 266 (2nd Cir. 1966):

> "It is settled law that a defendant who offers evidence after the denial of a motion for acquittal at the close of the Government's case in chief waives any claim as to the sufficiency of that case considered alone. *United States v. Calderon,* 348 U. S. 160, 164, n. 1, 75 S. Ct. 186, 99 L. Ed. 202 (1954); but see The Motion for Acquittal: a Neglected Safeguard, 70 Yale L. J. 1151 (1961). We have applied this rule when, as here, the judge ignored the command of F. R. Crim P. 29 (a) and reserved decision on such a motion, see *United States v. Goldstein,* 168 F. 2d 666, 669-670 (2 Cir. 1948), and the Supreme Court's approving citation of the *Goldstein* decision in *Calderon,* supra, indicates that it perceives no basis for distinguishing between the two situations, at least in the absence of a demand for a ruling on the motion and explicit refusal by the judge to obey the mandate of the Rule. Quite apart from this, we would consider the Government's case in chief sufficient to support Rosengarten's conviction."

Aside from any waiver question, there could not be any prejudicial error if at the time the motion was made the Government had produced sufficient evidence to justify submission of the case to the jury. We will, therefore, initially summarize only the Government's evidence which standing alone, in our opinion, is sufficient to sustain the jury's findings of guilt.

On the afternoon of October 22, 1965 between 4:30 and 5:30 p. m. defendant entered the Silhouette Lounge and ordered a scotch and water, paying for it with a ten dollar counterfeit bill. Mrs. Ambrose, who with her husband operated the Silhouette, gave defendant change for the bill. After defendant's departure, Mrs. Ambrose, being short of change, sent her fifteen year old son to a nearby supermarket to obtain change for the bill received from the defendant. The clerk at the supermarket refused to change the bill, telling the boy it was counterfeit. The boy then returned the counterfeit bill to his mother.

Defendant was seen to leave the Silhouette Lounge and walk across the street to Maylock's Delicatessen where he purchased a loaf of bread, a quart of milk and a Hostess "twinkie." He paid for these items with a ten dollar bill which he laid on the counter, face up, while Mrs. Maylock sacked the groceries. Mrs. Maylock gave defendant change but as she put the bill in the cash register she noticed it was dark green on the back. She asked another customer to note the direction of the defendant and turned the bill over to her husband for examination.

A week later on the evening of October 29, 1965; some time between 10:00 and 10:30 p. m., defendant entered the Krueger Bar in University City. As the bar was crowded, defendant stood behind the customers sitting on the stools and consumed two drinks of scotch and laid a counterfeit bill on the bar. The bartender put the change on the bar, which defendant retrieved and departed. The bartender

noticed and testified that the bill had "a bad look and it just didn't feel like regular money," and he gave it to a police officer around 11:00 o'clock that night.

A description of the defendant and an arrest order had been put on teletype on the evening of October 22, 1965, but he was not apprehended until the latter part of January, 1966. Between the time of making the purchases with which he was charged and trial date, defendant had changed the color of his hair.

The three counterfeit bills passed by defendant were identical as to serial number, plate number and denomination. In each instance, defendant passed the bills for small purchases of about one dollar. The defects in the bills were evidently obvious, as Mrs. Maylock immediately noticed that the coloring on the bill was bad and both the bartender at the Krueger Bar and the grocery clerk immediately detected the spuriousness of the bills. In addition to this evidence, during cross-examination and in response to defense counsel's question whether defendant was charged with passing any other bills, a secret service agent replied that defendant was associated with but not charged with passing two other bills at the Pancake House and the Valley Farm at about the same time in October.

The District Court must, as do we, in passing on this issue, view the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the Government. *Coon v. United States,* 360 F. 2d 550 (8th Cir. 1966).[1]

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[1] Other Eighth Circuit cases to the same effect are *Jacobs v. United States,* 359 F. 2d 960 (8th Cir. 1966); *West v. United States,* 359 F. 2d 50 (8th Cir. 1966); *Coil v. United States,* 343 F. 2d 573 (8th Cir. 1965), cert. denied 382 U. S. 821 (1965); *Lucas v. United States,* 343 F. 2d 1 (8th Cir. 1965), cert. denied, 382 U. S. 862 (1965); *Beatrice Foods Co. v. United States,* 312 F. 2d 29 (8th Cir. 1963), cert. denied, 373 U. S. 904 (1963).

In *Rood v. United States*, 340 F. 2d 506 (8th Cir. 1965), cert. denied, 381 U. S. 906 (1965), this court sustained a conviction for violation of this statute where it was shown that the defendant passed two spurious twenty dollar bills within a period of twenty-four hours. We think the evidence in the instant case is stronger than that in *Rood*. As observed by counsel for defendant, each of such cases must stand on its own peculiar facts. The Government's case clearly presented a jury question as to defendant's guilt. If defendant had insisted on a ruling on his motion at the close of the Government's case, the trial court would have been compelled to reject the motion. It follows that no prejudicial error resulted from the trial court's action in taking the motion under advisement.

We have referred only to the evidence in the Government's case adduced prior to defendant's motion for judgment of acquittal. At trial defendant took the stand and admitted that he handled a lot of cash. He did not deny passing the counterfeit bills for which he was charged, but he did deny knowledge they were counterfeit. Probably the most damaging statement defendant made in testimony was his account of the Pancake House incident. There he was challenged for passing an allegedly spurious bill, whereupon he tore the bill in half and made restitution with a genuine bill. This is hardly the reaction to be expected from one innocent of knowledge that a bill he passed was counterfeit.

Although not raised at the trial below or in briefs, defendant, for the first time, in oral argument urgently contended that the court erred in giving the following instruction:

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[2] See also and compare *United States v. Carlson*, 359 F. 2d 592 (3rd Cir. 1966); *United States v. Releford*, 352 F. 2d 36 (6th Cir. 1965), cert. denied, 382 U. S. 984 (1966); *United States v. Jonikas*, 187 F. 2d 240 (7th Cir. 1951), cert. denied, 344 U. S. 877 (1952); *Bell v. United States*, 100 F. 2d 474 (5th Cir. 1938).

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

Preliminarily, we note defendant failed to comply with Fed. R. Crim. P. 30, requiring an objection to the instruction. Compliance with this rule would have afforded the trial court an opportunity to either omit the instruction or change its language in such a fashion as to make it innocuous. Recognizing this, counsel insists that plain error exists affecting substantial rights which we can recognize under Fed. R. Crim. P. 52 (b).

This and other courts have criticized giving of this or a similar instruction in certain cases. We held in *Imholte v. United States,* 226 F. 2d 585, 591 (8th Cir. 1955), that it is better not to give the instruction in a case where intent is not inherent in the act itself, but its inclusion in a charge does not constitute prejudicial error where ". . . the charge considered as a whole correctly stated the law with sufficient clarity as not to be misleading." *Accord, Sherwin v. United States,* 320 F. 2d 137 (9th Cir. 1963), cert. denied, 375 U. S. 964 (1964).

In *Mann v. United States,* 319 F. 2d 404 (5th Cir. 1963), cert. denied, 375 U. S. 986 (1964), the court held the giving of this instruction was plain error requiring a reversal in an income tax conviction.

In *United States v. Releford,* 352 F. 2d 36 (6th Cir. 1965), cert. denied, 382 U. S. 984 (1966), the court rejected the contention defendant makes here, reasoning that giv-

ing of the instruction was not reversible error where the proof of guilt was strong.[3]

In our opinion, the evidence in this case is strong and convincing. Defendant did not deny passing the counterfeit bills and the pattern used in passing them by one

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[3] In *United States v. Releford, supra,* note 2, the court stated at page 40:

"The court charged the jury as follows:

"'It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts which he knowingly does or knowingly omits to do. So, unless the contrary appears to you from the evidence, you may draw the inference that Mr. Releford intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act which he knowingly did or knowingly omitted.'

"Relying on the Fifth Circuit's decision in *Mann v. United States,* 319 F. 2d 404, 407 (1963), that such an instruction was erroneous, appellant here charges error in the giving of it. We have had occasion to characterize the language of the involved instruction as clumsy and inartistic but in *United States v. Denton,* 336 F. 2d 785, 788 (C. A. 6, 1964), where the proof of guilt was strong as it is here, we held that the use of it was not reversible error. Speaking for this court Judge Edwards there said:

"'This instruction has been recently and vigorously criticized by the Fifth Circuit, *Mann v. United States,* 319 F. 2d 404 (C. A. 5, 1963), cert. denied 375 U. S. 986, 84 S. Ct. 520, 11 L. Ed. 2d 474 (1964). It has also been held more recently by the Ninth Circuit not to constitute prejudicial error under the whole instruction on intent therein given. *Sherwin v. United States,* 320 F. 2d 137 (C. A. 9, 1963), cert. denied 375 U. S. 964, 84 S. Ct. 481, 11 L. Ed. 2d 420, rehearing denied 376 U. S. 946, 84 S. Ct. 796, 11 L. Ed. 2d 771 (1964). We feel that the second sentence of the instruction quoted above is at best clumsy and, if taken alone, confusing. On this record, however, and under a total instruction on intent very similar to that in the Sherwin case, we do not think the error affected any "substantial right" of defendant.' 336 F. 2d 788.

"We consider that such observations are appropriate and controlling here."

For other cases on the subject see and *cf. Agnew v. United States,* 165 U. S. 36, 53 (1897); *United States v. Barash,* 365 F. 2d 395, 402, 403 (2nd Cir. 1966); *Estes v. United States,* 335 F. 2d 609, 615-617 (5th Cir. 1964), cert. denied, 379 U. S. 964 (1965).

who handled a lot of money, as defendant admittedly did, amounts to strengthful proof of scienter.

The trial court clearly and plainly instructed the jury on defendant's presumption of innocence, the burden resting on the Government to prove defendant's guilt beyond a reasonable doubt, and specifically upon the two essential elements required in this type case, being the act of passing a counterfeit obligation and the doing so with intent to defraud. The court cautioned the jury in addition to defining the element of intent that, in order to find defendant guilty, they must find and believe that his acts were intentionally and knowingly done. Furthermore, the jury was admonished that it was their sworn duty to acquit defendant unless convinced beyond a reasonable doubt that defendant knew of the counterfeit character of the bills.[4]

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[4] Excerpts from the court's charge:

"Two essential elements are required to be proved beyond a reasonable doubt in order to establish the offenses charged in each count of the indictment:

"First, the act or acts of passing or uttering any counterfeited obligation of the United States, namely, currency in the denomination of ten dollars ($10.00) as charged; and

"Second, doing such act with intent to defraud.

"As stated before, the burden is upon the government to prove beyond a reasonable doubt every essential element of the crime charged.

"It is the position of the defendant that at the time the defendant possessed and passed the counterfeit currency mentioned in the evidence that he did so without knowledge that the currency was counterfeit and thereby had no intent to defraud. Accordingly, if you are not convinced beyond a reasonable doubt that the defendant knew of the counterfeit character of the United States currency mentioned in the evidence, then it will be [your] sworn duty to find the defendant not guilty and acquit the defendant.

"Now, in a criminal case, the matter of intent is, of course, an essential element which must exist, in order for the accused to be criminally liable. Therefore, in order to find this defendant guilty, you must not only believe that he did the acts complained of, and of which he stands charged, but you must also believe that the acts were intentional and knowingly done by the defendant.

Upon consideration of the charge as a whole, it would be unrealistic for us to assume that the jury was misled, confused or in any manner swayed or influenced by the giving of the instruction. Additionally, we are mindful of Fed. R. Crim. P. 52 (a). In discussing this rule in our recent case of *Gresham v. United States,* ... F. 2d ... (8th Cir. No. 18,573, March 30, 1967), Judge Matthes aptly observed:

> "Rule 52 (a), Fed. R. Crim. P., provides that any error which does not affect substantial rights shall be disregarded. The Courts have uniformly held that prejudicial error must be shown before a reversal is justified. (Citations omitted.) The strength of the Government's case is an important factor in determining the existence of prejudicial error. (Citations omitted.)"

As has often been stated, a defendant is entitled to a fair trial but not a perfect trial. We are convinced on the record here that the defendant received a fair trial, free of prejudicial error, and the judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

"'Knowingly' as used in these instructions means that state of mind wherein a defendant was in possession of facts from which he knew, or was aware that he could not legally do or fail to do the acts whereon he here stands charged.

"You will note that the charges in the indictment are alleged to have been done with the 'intent to defraud.' To act with 'intent to defraud' means to act knowingly and with the specific intent to deceive or cheat for the purpose of causing some loss to another or bring about some financial gain to one's self."

APPENDIX B.

Judgment.

United States Court of Appeals
For the Eighth Circuit.

No. 18,404. September Term, 1966.

Charles Myron Moore,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Charles Myron Moore, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

April 19th, 1967.

Order entered in accordance with Opinion:—

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

APPENDIX C.

Conflicting Opinion of Mann v. United States, 319 F. 2d 404, 407-410 (5th Cir. 1963), Cert. denied, 375 U. S. 986 (1964).

A far more complex problem is raised by Dr. Mann's second contention, which relates to the following portion of the Court's oral charge:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which once standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

No objection was made to the charge when given; but it is contended that it is so plainly erroneous that this court should notice the error under rule 52 (b), F. R. Crim. P. The Government does not seriously contend that the above quoted portion of the charge, standing alone, is not erroneous. It claims that other portions of the charge rectified any error committed; and when the charge is read as a whole, the issue of wilfulness was fairly presented to the jury. The entire portion of the court's charge relating to wilfulness is printed in the margin.[3]

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[3] "In every crime there must exist a union of joint operation of fact and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt. Specific intent must be proved before there can be a conviction. Specific intent as the term itself suggests, requires more than a mere general intent to engage in certain conduct. A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with evil motive or bad purpose either to disobey or to disregard the law, may be found to act with specific intent. An act or failure to act is done know-

Dr. Mann argues that the effect of that portion of the charge of which he complains was to make the jury aware of a certain factual hypothesis and to instruct them that if they believed this hypothesis was established by the evidence, they were then authorized, absent opposing evi-

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ingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason.

"In considering the defendant's guilt or innocence you are instructed that it must be shown beyond a reasonable doubt that the defendant, Nathan Mann, wilfully and knowingly attempted to evade taxes as charged in Counts One, Two and Three, considering each count separately, with a specific intent to evade such taxes. In our law such specific intent means more than intentional or voluntary filing of a return that may be shown to be incorrect or false, if there were any such returns filed, for it must be shown beyond a reasonable doubt that such filing was accompanied by an evil motive and wrong purpose. Otherwise, you should find him innocent.

"If you find that the defendant, Nathan Mann, acted in good faith in filing one or all of such returns as described in the indictment, you shall find him not guilty as to the one or all of such counts, considering each separately, which were accompanied by such good faith, if any.

"The intent involved in this offense and required to be shown is not proved merely by filing a return that is false, but requires the specific intent on the part of the defendant involving bad purpose and evil motive, and that specific intent must be clearly inferred from the evidence and you must so find from the evidence beyond a reasonable doubt.

"Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

"It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

"In determining the issue as to intent, the jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid in determining state of mind."

dence, to infer that Dr. Mann's intent was tax evasion. This, he contends, is tantamount to an incriminating presumption which the jury, absent opposing evidence, could use as a substitute for proof. We agree.

In Morissette v. United States, 342 U. S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952), the defendant, while hunting on a government bombing range, carried away and sold three tons of used bomb casings. He was prosecuted for knowingly converting government property to his own use. The trial court refused to submit the question of wilfulness to the jury, holding that such intent was "presumed" from the defendant's act. In reversing the conviction, the court stated:

> "We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit."

Identical charges, strikingly similar to the charge under consideration in the instant case, were involved in three cases, two of which were decided by this court. Berkovitz v. United States, 5 Cir., 1954, 213 F. 2d 468; Wardlaw v.

United States, 5 Cir., 1953, 203 F. 2d 884; Bloch v. United States, 9 Cir., 1955, 221 F. 2d 786. In all three cases the court charged:

> "The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

Convictions in all three cases were reversed on appeal. The opinions held that the effect of the charge was to tell the jury that it could draw the conclusion that the defendant intended to defeat the payment of the tax from the mere fact that an incorrect return was filed; and resulted in a shifting of the burden of proof from the Government to the defendant. As stated in Berkovitz with reference to the charge:

> "It had, of course, told the jury in other parts of the charge that the defendant was presumed to be innocent until proved guilty beyond a reasonable doubt with full elucidation of what this meant. However, the error was in telling them that as a matter of law they could presume criminal intent from the circumstances described in the questioned charge, without at the same time telling them they must consider all the evidence including that offered by defendant to disprove that intent, that the burden of proof never shifted and the Government, in spite of those circumstances, was required to prove the guilt of defendant beyond a reasonable doubt."

[2] The instructions in the instant case go beyond the bounds of the charge set out in the above cited cases. If the charge had ended when the jury was told that a person is presumed to intend the natural consequences of his own acts, when considered in the light of the charge as a

whole, there would have been no error. When the words, "So unless the contrary appears from the evidence" were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. If an inference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption. Such a burden is especially harmful when a person is required to overcome a presumption as to anything subjective, such as intent or wilfulness, and a barrier almost impossible to hurdle results.

[3] The quoted charge is subject to another vice. The statute involved, 26 U. S. C. A., § 7201, specifically provides that the crime of income tax evasion must be accompanied by a specific intent on the part of the accused to defeat or evade the tax, which must be proved by independent evidence. Spies v. United States, 317 U. S. 492, 63 S. Ct. 364, 87 L. Ed. 418 (1943). Under the instruction here involved, the jury is invited to speculate as to what any other person similarly situated to Dr. Mann and with like knowledge, would reasonably have expected to be the consequences of the conduct under consideration as shown by the evidence. The test is whether Dr. Mann himself wilfully attempted to evade or defeat the tax. The following charge was condemned in Chappell v. United States, 9 Cir., 1959, 270 F. 2d 274.

> "Criminal intent is a necessary ingredient of the crime charged in the indictment, and before a verdict of guilty may be rendered you must find from the evidence, beyond a reasonable doubt, that the defendant intended to commit the offense against the United States charged in the indictment. In this connection, you are instructed that every person is presumed to intend the natural consequences of his own voluntary and deliberate acts. One who volun-

> tarily and deliberately performs an act which, from our common experience, is known to produce a particular result, may be presumed to have anticipated and intended that result."

The court held that the quoted charge conflicted with the overriding presumption of innocence with which the accused is endowed under the law.

Our attention is called to the case of Bernstein v. United States, 5 Cir., 1956, 234 F. 2d 475, in which it was said that every charge of a presumption other than that of innocence is not reversible error in a criminal trial. It is not our holding that every charge using the word "presumption" is reversible error. We do hold that it is error to give a charge in a criminal case of this nature, the overall effect of which is to place a burden upon the defendant to produce evidence to overcome a presumption of guilt.

[4, 5] We are not unmindful of the case of Legatos v. United States, 9 Cir., 1955, 222 F. 2d 678, and Windisch v. United States, supra, which hold that when a charge as a whole fairly gives the law to the jury on the necessity of wilfulness in an income tax evasion case, that one isolated part of the charge that a person is presumed to intend the natural consequences of his acts, does not constitute prejudicial error. Even though the trial judge did give an accurate charge on the necessity of intent and the burden of proof, we hold that to leave the jury with that part of the charge complained of in this case was not cured by what was said elsewhere in the charge. Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent one. Perez v. United States, 5 Cir., 1961, 297 F. 2d 12.

[6] Counsel for Dr. Mann did not object to the charge as required by Rule 30, F. R. Crim. P. The sole defense

of Dr. Mann was his contention that he did not intend to evade or defeat, the tax imposed; and he denied that his conduct was wilful or that he had any evil motive or intent to defraud. We think that an error affecting such a vital aspect of the case is fundamental. Rule 52 (b), F. R. Crim. P. provides:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

As stated in Bloch: "The error of the trial court is * * * fundamental and goes to the very essence of the case so we must under the rule take notice of it." As emphasized in Perez, it is never permissible to leave the jury with the idea that it becomes the duty of the defendant to establish his innocence. The charge in this case could very well have had that effect, and as such, we cannot allow the conviction to stand.

For the foregoing reasons, the judgment of conviction on all three counts is reversed and the case is remanded for a new trial.

APPENDIX D.

Conflicting Opinion of Bloch v. United States, 221 F. 2d 786, 788-789 (9th Cir. 1955).

. . . it becomes apparent that the charge was incorrect in several aspects, which will be hereinafter discussed.

[3] The appellant made no objection to the charge as given by the Court, but only objected to the failure of the Court to give his requested instruction, nor did appellant raise in this Court any question regarding the correctness of the trial Court's charge on wilfulness. Whether the objection to the failure to give the offered instruction on wilfulness in the trial Court, and the specification of that failure as error in this court would be

a sufficient saving of the point to permit this Court to consider other non-specified errors in the charge on wilfulness within the rule that Appellate Courts will not consider instructions to which no objections were taken at the time of trial need not be decided because of the provisions of Rule 52 (b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., and cases decided thereunder. Rule 52 (b) provides:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The Supreme Court of the United States in U. S. v. Atkinson, 297 U. S. 157, 56 S. Ct. 391, 392, 80 L. Ed. 555, concerning this matter, said:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."

See also Morris v. United States, 9 Cir., 156 F. 2d 525, 169 A. L. R. 305; U. S. v. Balodimas, 7 Cir., 177 F. 2d 485; U. S. v. Perplies, 7 Cir., 165 F. 2d 874; Fischer v. U. S., 10 Cir., 212 F. 2d 441, 444.

The error of the trial court is, as we hereinafter point out, fundamental and goes to the very essence of the case so we must under the rule take notice of it.

[4] Proceeding then to a consideration of the Court's charge we find the trial Court instructed the jury in part as follows:

> "The attempt must be wilful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant."

That is a correct statement of the law, because the intent involved in the offense with which appellant here was charged is a specific intent involving the bad purpose and evil motive to evade or defeat the payment of his income tax. Wardlaw v. U. S., 5 Cir., 203 F. 2d 884. However, the trial Court went on in his instruction, and in the very next sentence said:

> "The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

This is not a correct statement of law with regard to a criminal offense wherein specific intent is an essential element. Morissette v. U. S., 342 U. S. 246, 273, 72 S. Ct. 240, 96 L. Ed. 288; Wardlaw v. U. S., supra. As the Supreme Court said in the Morissette case, supra, 342 U. S. at page 275, 72 S. Ct. at page 256:

> "We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused, and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary.

Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit."

The conclusion sought to be supplied by presumption in the Morissette case was one of intent to seal casings, based upon the mere fact the defendant took them. What was said in that case applies equally to the case at bar where under the above portion of the trial Court's charge the jury was told in effect that they could draw the conclusion that the appellant had intended to defeat or evade the payment of his tax from the mere fact that he filed an incorrect income tax return.